HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2)(b)

Description of the case

WPMB no. 507 of 2003

M/S Anghalia Housing & others

Vs.

State of Uttaranchal

Approved for reporting

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~~Not approved for reporting~~

Dated of decision 16.5.2006

Initial of Judge.

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO. 507 (MB) OF 2003

1. M/s Anghalia Housing (Pvt.) Lt.
   Having its registered office at B4, Hauz Khas, New Delhi, through its Director Narsh Kumar, S/o Sri Shyam Lal.
2. Naresh Kumar,
   s/o Sri Shyam Lal
   R/o 237, Shastri Nagar,
   Meerut. .....Petitioners.

Versus

1. State of Uttaranchal, through Chief Secretary, Govt. of Uttaranchal, Dehradun.
2. District Magistrate, Dehradun.
3. Chief Conservator of Forest, Dehradun.
4. Divisional Forest Officer (West), Dehradun.
5. Forest Settlement Officer/Sub Divisional Magistrate, Dehradun .....Respondents.

Dated: 16.05.2006

Hon'ble Rajesh Tandon, J.

Heard Sri Arvind Vashisth, Advocate for the petitioner and Sri M.S. Negi, Sr. Advocate, Advocate General, assisted by standing counsel for the respondents.

By the present writ petition, the petitioner has prayed for quashing the order dated 29th May, 2003 passed by the respondent no. 5.

Briefly stated, the proceedings were started on a notification dated 1st September, 1969 U/s 1(3) read with Section 2(1)(c) of the Indian Forest Act. Aggrieved by the said notification dated 1st September, 1969 and subsequent

notification dated 26.03.1970, a writ petition was filed being Writ Petition No. 2160 of 1970. The writ petition was allowed by the Allahabad High Court and the order dated 26.03.1970 passed by the District Magistrate/Collector was quashed. Operative portion of the order is quoted below:-

"In accordance with the opinion of the learned third Judge, the writ petition is allowed with costs and the order of the Collector, Dehradun, dated March, 26, 1970 (Annexure 'R' to the writ petition) is quashed and a writ of mandamus is issued commanding the respondents not to interfere with the petitioner's utilization and development of the Anghaila Housing Colony, Dehradun, within a reasonable time."

According to the petitioner, he came to know vide news item published in Hindi Daily Amar Ujala in its edition dated 13.09.1998 that the Forest Settlement Officer had issued a declaration under Section 6 of the Indian Forest Act, 1927, whereby he invited objections from the interested persons.

A bare perusal of the said declaration shows that the aforesaid declaration was made in pursuance of a notification no. 4968/142-96-4 (1)/96 dated 20.11.96 issued by the State Government, whereby the land detailed in the enclosed schedule was decided to be kept as "reserved forest".

The petitioner immediately after coming to know with regard to the issuance of the proclamation under Section 6 of the Indian Forest Act, 1927, submitted its objections before the Sub Divisional Officer/ Forest settlement Officer. State Government preferred a counter reply and accordingly the case was registered as case No. 261/98-99 in the court of respondent no. 5.

In the aforesaid case, the evidence was led by both the parties and the respondent no. 5 heard the counsel for both the parties. Petitioner has submitted that authority concerned after having taken the evidence and properly adverting himself

to the material available on record vide his order dated 21.03.2003 allowed the objections filed by the petitioner and recoded a categorical finding that the land in dispute cannot be declared as reserved forest in view of the judgment and order dated 11.11.1975 passed by the Hon'ble Apex Court in Civil Appeal No. 2046 of 1974 (State of Uttar Pradesh and other Vs. Anghaila Housing (P) Ltd & Ors) and ultimately allowed the objections filed by the petitioner and recorded a categorical finding that the land in dispute cannot be declared as reserved forest in view of the judgment and order dated 11.11.1975 passed by the Hon'ble Apex Court.

An application was moved on 29.05.2003 under Order 9 Rule 13 C.P.C. by the State i.e. after a lapse of more than two months for setting aside the order dated 21.03.2003. The same was allowed on 29.05.2003. Against the said order, the petitioner has preferred the present writ petition.

In the meantime, the respondents have also preferred an appeal. The appeal has already been dismissed on 13th July, 2004. The State of Uttaranchal has filed the Writ Petition No. 847 of 2004 against the said dismissal order. When the writ petition came up for hearing, counsel for the petitioner has submitted that in view of the disposal of the appeal, the said order has already merged in the order dated 21st March, 2003, which was passed against the State and the appeal having been decided. It is not open for the respondents to pursue the application under Order IX Rule 13 C.P.C. any more.

Order IX Rule 13 of the C.P.C. reads as under:-

"13. Setting aside decree ex parte against defendant-

In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside: and if he satisfies the

Court the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also :

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.]

[Explanation.- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree]."

The Advocate General has referred the judgment of ***Kewal Ram Vs. Smt. Ram Lubhai AIR 1987 SC Page 1304***. Paragraph 6 reads as under:-

"6. The learned counsel for the plaintiff contended that the two brothers of Kewal Ram were at all relevant time aware of the pendency of the suit and that the Court below committed an error in setting aside the decree against them. To reinforce this contention, he brought to our notice the fact that even in the appeal filed by Kewal Ram, the address given of his brother was the village address. He further submitted that the application under O. 9 R 13 made before the trial Court was incompetent since the decree passed by the trial Court has merged in the appellate decree. He feebly put

forward a case of complicity between the two brothers to defeat the plaintiff."

As will appear from the aforesaid judgment of the Apex Court that only exception to the maintainability of the application under Order IX Rule 13 was that when the decree is passed without any notice to the parties, it will be no decree in the eyes of law. In the present case State themselves have filed an appeal and the appeal having been decided on merits, therefore, the doctrine of merger will apply to the facts of the case. In ***Rani Chaudhary Vs Suraj Jit Chaudhary AIR 1982 SC Page 1397*** after relying upon the various judgments of the Apex Court, it has been held as under:-

"13. The principal question as to whether the application made by the husband for setting aside the ex parte decree is competent or not in view of the provisions contained in the Explanation in O.9. 13 of the Civil P.C. read as follows:-

"In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to get it aside; and if he satisfied the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called an order setting aside the decree make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that

the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.

Explanation.- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for settling aside that ex parted decree."

Order O, R. 13 makes provision for setting aside of an ex parte decree against the defendant. It lays down the conditions and also the procedure for the setting aside of an ex parte decree. The Explanation was introduced into this provision by the Code of Civil Producer (Amendment) Act, 1976 (Act 104 of 1976) and it has come into force form 1-2-1977. The proceeding by the wife was initiated on 1-9-1979 and the ex parte decree of divorce in her favour was passed on 6-12-1979. The application by the husband has been made for setting aside this ex parte decree. The Explanation, therefore, operates; the real question being whether in the facts and circumstances of this case the bar created by the Explanation to the setting aside of an ex parte decree is attracted to the present application.

14. A plain reading of the Explanation clearly indicated that if any appeal against an ex parte decree has been disposed on an ground other than the ground that the appellant has withdrawn the appeal, no application for setting aside the ex parte decree under O.9R. 13 of the Code will be entertained. The words used in the Explanation are clear and unambiguous. The language used in the explanation clearly suggests that a decree passed ex parte and the appeal has been disposed of on any ground other that the ground that the appellant has withdrawn the appeal, no application shall le under O.9, Rule 13 of the Code for setting aside the ex parte decree. An appeal may be disposed

of on various grounds. It may be disposed of after proper hearing on merits and this is usually the normal way of disposal of an appeal. An appeal may be disposed of also for non-prosecution thereof. Though the dismissal of an appeal on the ground of non-prosecution thereof. Though the dismissal of an appeal on the ground of non-prosecution of the same is not disposal of the appeal on merits, yet the dismissal of the appeal for non-prosecution results in the disposal thereof. An appeal may also be dismissed on the ground of limitation, if condonation of delay in filing the appeal is not allowed by the Court. An appeal may also be liable to be dismissed for non-compliance with any condition relating to the filing of the appeal and also entitled to withdraw the appeal and the withdrawal of the appeal also results in the disposal of the appeal, though in such a case no merits of the appeal are adjudicated upon. The language used in the explanation makes it clear that the withdrawal of an appeal is considered to be disposal of the appeal as contemplated in the Explanation. It is significant to note that though an appeal may be disposed of on very many grounds the Legislature has through it fit to proved in the Explanation that only when an appeal against an ex parte decree is disposed of on the ground that the appellant has withdrawn the appeal, the bar created to the maintainability of an application under O.9 R. 13 of the Code for setting aside the ex parte decree will not apply. The legislature must be presumed to know that there are various ways of disposal of an appeal. The Legislature has, however, thought it fit to provide that an appeal has been preferred against an ex parte decree, the disposal of the appeal on any ground excepting the solitary ground of disposal of the appeal by withdrawal of the same by the appellant will create a bar to the maintainability of an application under Order 9, Rule 13

of the Civil P.C. By specifically providing in the Explanation that the disposal of any appeal from the ex parte decree on any ground other than the solitary ground of withdrawal; of the appeal by the appellate, the legislative intent is made manifestly clear that in all other cases of the disposal of the appeal on any other ground that the ground of withdrawal of the appeal, there will be a bar to the maintainability of the application under O. 9, R. 13 and no application will lie under O. 9, R. 13 for the setting aside of an ex parte decree. Withdrawal of an appeal by an appellant does not result in any adjudication on merits. Even then, the withdrawal of an appeal is still considered to be a disposal of the appeal; and the disposal of an appeal only on this ground of withdrawal of the appeal by appellant, it is made clear in the Explanation, will not create any bar to the maintainability of the application under O. 9, R. 13 of the Civil P.C. On a proper interpretation of the Explanation we are of the opinion that where there has been an appeal against an ex parte decree and the appeal has not been withdrawn by the appellant and has been disposed of on any ground, the application under O. 9, R. 13 of the Civil P.C. will no lie and cannot be entertained.

15. In the instant case, an appeal had admittedly been filed against the ex parte decree. The appeal was beyond time. The appellant had not withdrawn the appeal. The appellant had filed an application for condonation of delay in preferring the appeal. The application for condonation of delay had been rejected by the Court and the appeal had been dismissed on the ground of limitation. The dismissal of the appeal on the ground of limitation resulted in disposal of the appeal though not on merits. The appeal filed against the ex parte decree was, therefore, disposed of on grounds other than the ground that the appellant had withdrawn the appeal. The application under O. 9, R. 13 after the disposal of

the appeal, therefore, became incompetent in view of the provisions contained in the Explanation and could not therefore, be entertained by the Court. The view expressed by the High Court must, therefore, be held to be erroneous.

In view of the aforesaid, I find no merit in the writ petition as the order impugned having merged in the final order, writ petition is dismissed accordingly.

No order as to costs.

(Rajesh Tandon, J.)

16.05.2006
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